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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BRENDA THORNTON,
Petitioner,

vs.

EQUIFAX, INC., A GEORGIA CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioner, Brenda Thornton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 27, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. Rehearing en banc was denied on April 1, 1980. The District Court opinion, *Thornton* v. *Equifax, Inc.* 467 F. Supp. (D.C. Ark., 1979) 1008, is also included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 27, 1980. This Petition is filed within ninety (90) days of that date. The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 19 (1) (B). Jurisdiction of the Supreme Court is invoked under Supreme Court Rule 19 (1) (B). Jurisdiction in the Courts below was predicated on the Fair Credit Reporting Act as set fort in Title 15 U.S.C.A. Section 1681 p.

QUESTION PRESENTED

Does the limitation of liability section of the Fair Credit Reporting Act (Section 1681 h(e)) negate the liability sections of the Act for willful noncompliance and negligent noncompliance with the Act (Section 1681 n and 1681 o)?

STATUTORY PROVISIONS INVOLVED

I.

COMPLIANCE PROCEDURES

Title 15 Section 1681 e:

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of Section 1681 c of this Title and to limit the furnishing of consumer reports to the purposes listed under Section 1681 b of this Title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer

reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in Section 1681 b of this Title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

II.

LIMITATION OF LIABILITY

Title 15 Section 1681 h(e):

Except as provided in Section 1681 n and 1681 o of this Title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to Section 1681 g, 1681 h, or 1681 m of this Title, except as to false information furnished with malice or willful intent to injure such consumer.

III.

PROCEDURES IN CASE OF DISPUTED ACCURACY

Title 15 Section 1681 i:

(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to

believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

IV.

CIVIL LIABILITY FOR WILLFUL NONCOMPLIANCE

Title 15 Section 1681 n:

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

1. Any actual damages sustained by the consumer as a result of the failure;

2. Such amount of punitive damages as the Court may allow; and

3. In the case of any successful action to enforce any liability under this section, the cost of the action together with reasonable attorney's fees as determined by the Court.

V.

CIVIL LIABILITY FOR NEGLIGENT NONCOMPLIANCE

Title 15 Section 1681 o:

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

1. Any actual damages sustained by the consumer as a result of a failure;

2. In the case of any successful action to enforce any liability under this section, the cost of the action together with reasonable attorney's fees as determined by the Court.

STATEMENT OF THE CASE

On December 29, 1974, Brenda Thornton was divorced in Blytheville, Arkansas, and received custody of her seven year old daughter and possession of a used Mercury automobile which had been jointly titled in her name and that of her former husband. In August or September of 1975 she went to her local insurance agent's office and asked that the policy be renewed in her name alone. On October 9, 1975, she received a call from such local insurance agent indicating that he had received a report that for four months she had had a male companion living with her without benefit of matrimony and this presented a problem in her application. She was upset because this report was untrue and she eventually learned that the report had been prepared and disseminated by Equifax. She demanded that Equifax correct the report and remove same from the records of Equifax. Equifax refused to change the matter, reinvestigated the matter, and still refused to change its position.

Suit was filed and on February 4, 1979, a jury awarded Brenda Thornton compensatory damages of Five Thousand Dollars ($5,000.00) and punitive damages of Two Hundred Fifty Thousand Dollars ($250,000.00). Equifax defended on the basis that its procedures were adequate and the report was true.

Motions were filed for a judgment notwithstanding the verdict, a new trial, and in the alternative, a remittitur. All motions of Equifax were denied by District Judge Bruce M. Van Sickle in a written opinion.

Subsequently, the Court of Appeals reversed and remanded for a new trial on the basis of confusing and erroneous jury instructions. In essence, the Court of Appeals held that the limitation of liability section in the Fair Credit Reporting Act (15 U.S.C.A. Section 1681 h(e)) was controlling and that the jury had not been properly instructed on the standard of "malice or willful intent to injure" which must be shown to overcome such limitation of liability section. By Petition for Rehearing, Brenda Thornton asked the Court of Appeals to review its decision contending that the effect of the decision would be to frustrate the Congressional policy enunciated in the Fair Credit Reporting Act, and in fact to make the rights of a consumer weaker than before the enactment of such Act. The Petition for Rehearing En Banc was denied and the Petitioner now seeks review by way of Certiorari.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals Is an Interpretation of an Important Question of Federal Law Affecting Consumer's Rights Which Has Not Been, But Should Now Be, Resolved by This Court. The Effect of the Court of Appeals Opinion Is to Construe the Limitation of Liability Section of the Fair Credit Reporting Act in Such Fashion As to Negate the Liability Sections of the Act. The Congressional Intent to Allow Redress to Consumers as Enunciated in the Fair Credit Reporting Act Will Be Frustrated by This Ruling. A Writ Should Be Granted Pursuant to Rule 19 of the Supreme Court Rules Because of the Importance of the Federal Question of Law Which Needs to Be Settled By This Court.

The question that must be addressed by this Court is the question of the relationship between the limitation of liability section of the Fair Credit Reporting Act (Section 1681 h(e)) to the liability sections of the Act (Section 1681 n and o). Petitioner feels strongly that the issue she is raising merits such attention because the effect of the Court of Appeals' decision can be to destroy the rights guaranteed to consumers under the Fair Credit Reporting Act. The logical impact of the present decision is to allow the section on limitation of liability to in fact swallow up the entire liability sections of the Act. In fact, if allowed to stand, this decision will have made the rights of consumers against credit reporting agencies less than before the FCRA was passed by a Congress sensitive to past abuses of such agencies.

By way of brief factual background, Brenda Thornton, a divorced mother with custody of her one child, applied for renewal of insurance coverage on an automobile. Some time later the insurance agent received and made Brenda aware of a consumer investigative report which included language stating that she had been "for the past four months . . . living without benefit of matrimony with a male companion." Brenda was upset and demanded to know the source of the report which she

eventually ascertained to be Equifax. At the time of the application for insurance and at the time her agent advised her of the contents of the report, Brenda was not aware that a report had been requested nor was she aware of the existence of a company called Equifax. Equifax representatives read the report to Brenda, but this was the same information she had previously received from her insurance agent. Brenda demanded that the report be corrected. A reinvestigation was ordered, and the same Equifax investigator who had compiled the original report composed a new report deleting the defamatory information. However, the Equifax supervisor made a management decision not to mail out the corrected report saying to do so would have been a "cop-out" to its insurance company client. Even after results of the reinvestigation and the corrective report were submitted, the Equifax manager refused to correct Brenda's file and refused to remove the damaging information, maintaining at trial three years later that Equifax would stand by its original report.

No evidence whatsoever was introduced at the trial as to the veracity of the report, and the truth of the report was strenuously denied by Brenda Thornton. Additionally, the man identified by Equifax as the male companion, Jerry Wallace, and his father testified at trial that the report was totally false. It was Brenda who called as witnesses all Equifax "sources," and they each either denied making such statements to Equifax or insisted in effect that they had been misquoted.

The bulk of the proof adduced at the trial was addressed to noncompliance by Equifax with the provisions of the Fair Credit Reporting Act. Brenda Thornton maintained that Equifax knowingly and willfully failed to exercise reasonable procedures to assure the maximum possible accuracy of the information contained in the report about her. Further, she maintained that Equifax knowingly and willfully retained such damaging and derogatory information in her file even though after such investigation, such derogatory information could not

be verified. The proof established that the Equifax investigator had 12 to 15 reports to do on a daily basis and normally allowed an average of thirty minutes or so for a report. The report on Brenda Thornton was prepared on the basis of a conversation of a few moments with one individual and a conversation with another individual (on the spur of the moment) in connection with a conversation with that individual about other matters. The investigator talked with a co-worker of Brenda Thornton but did not even see fit to seek any verification from her about Brenda's living situation. The investigator maintained that he had placed a telephone call to Brenda at her place of employment but did not call back when he was unable to speak with her at the time.

The recklessness of the investigation was further accented by the investigator's testimony that upon Brenda being unavailable at the time of the first phone call, he did not bother to place another one. In the original investigation, the investigator did not contact a single neighbor. Yet, in his testimony the Equifax manager admitted that a neighbor check should have been done and that he was under the impression that his investigator had done so, and it would have been "reckless" to do otherwise. Such investigator made no attempt to contact the alleged paramour of Brenda Thornton or the parents of the alleged paramour to attempt further verification. The evidence established that Equifax had given its investigative agent absolutely no procedures to follow in making such investigation and further that there was absolutely no level of review by any supervisory person before the information was mailed out. The evidence established that the Equifax investigator relied on superficial impressions without even taking the time to interrogate about the facts behind such general impressions, and Appellant's manager admitted that such conduct as this would be "reckless." The evidence disclosed that an investigator has six working days from the time a report comes in to complete such report and that this report came in on September 2 and was mailed out on September 8. The regional manager of Equifax

testified that the fact that an investigator was busy had never been accepted as an excuse for not meeting such six day requirement even though the investigator was doing 12 to 15 reports per day. The aforesaid proof illustrates a lack of reasonable procedures to assure maximum possible accuracy of the information reported as is required by the Fair Credit Reporting Act.

Another section of the Fair Credit Reporting Act in issue at trial had to do with removing from a consumer's file information that could no longer be verified. After a reinvestigation, the Equifax investigator in sworn testimony at the trial admitted that he had "doubts" about the accuracy of his original report and thus transmitted a corrected report to the regional manager. The aforesaid regional manager knowingly and willfully refused to send out the corrected reports to the insurance company and refused to remove the damaging information from Brenda's file. This calculated, callous and cold decision not to correct the file even when the report was shown to be wrong is a most willful and flagrant violation of the Fair Credit Reporting Act. Even after receiving the corrected report, the regional manager of Equifax with 38 years of experience with the company testified that he decided not to send out the corrected report prepared by his investigator because this would be "not fair to our client." The testimony most revealing of the attitude of Equifax about the matter is as follows:

> Question: Did you tell Mr. Prevallet that you weren't going to apologize to Mrs. Thornton because you were going to stand on the information was correct?
>
> Answer by Equifax Manager: I told him that... as I recall, that I could not apologize because *it would only be hollow* from the standpoint that I was going to stand on the basis and *I saw no reason to apologize.*
>
> Question: The apology would be hollow because you saw no reason to apologize?

Answer: Because I was standing on the reports that were submitted, and information.

Question: Which you're still standing on?

Answer: That's right.

Even though the reinvestigation showed that the information could not be verified and an additional corrected report was made, the Equifax management made a deliberate decision not to correct the report and not to remove the damaging information from Brenda's file. This was an obvious example of Equifax elevating its own economic interest over the rights and feelings of Brenda Thornton.

Based on the aforesaid facts (which only highlight the recklessness of the investigation and the callous disregard by Equifax of the desire of Brenda Thornton to have the report corrected), Brenda Thornton maintained at trial that she was entitled to recover because of neligence and willful noncompliance with provisions of the Fair Credit Reporting Act, and she also relied on a pendent state claim of common law libel. The issue of statutory construction which Petitioner is asking this Court to consider involves 15 U.S.C.A. Section 1681 h(e) providing as follows:

> (e) *Except as provided in Section 1681 n and 1681 o of this Title*, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to Section 1681 g, 1681 h, or 1681 m of this Title, except as to false information furnished with malice or willful intent to injure such consumer. (emphasis supplied)

Equifax has continuously maintained that the only way it could be liable would be if it furnished false information with 'malice or willful intent to injure" Brenda Thornton. However, such an argument has the effect of reading out of existence and entirely ignores the first section of the aforesaid statute using the language "*except* as provided in Section 1681 n and 1681 o of this Title..." The Sections 1681 n and 1681 o are the liability sections of the Fair Credit Reporting Act and 1681 h(e) is the limitation of liability section. Again, the first eleven words of 1681 h(e) clearly show its inapplicability to the present action based on 1681 n and 1681 o. Reading the limitation of liability section to control is to allow the credit reporting agency to repeal a very important part of congressional legislation addressed to the protection of consumers, i.e., 1681 n and 1681 o, or at least to judicially graft a qualified immunity on those sections.

The sections which Equifax would repeal by its argument are as follows:

1681n

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

1. Any actual damages sustained by the consumer as a result of the failure;

2. Such amount of punitive damages as the Court may allow; and

3. In the case of any successful action to enforce any liability under this section, the cost of the action together with reasonable attorney's fees as determined by the Court.

1681o

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

1. Any actual damages sustained by the consumer as a result of the failure;

2. In the case of any successful action to enforce any liability under this section, the cost of the action together with reasonable attorney's fees as determined by the Court.

In this case, Brenda Thornton alleged that Equifax had violated the mandate of 1681 e(b) to the effect that a consumer reporting agency shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates. Furthermore, she alleged a violation of 1681 i(a) to the effect that "if after such reinvestigation, such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information." Thus, Brenda Thornton has charged violations of the Fair Credit Reporting Act and is entitled to recover for such willful and negligent violations under 1681 n and 1681 o as set forth above.

Incredibly, Equifax chooses to ignore the words "excepting" 1681 n and 1681 o from the limitation of liability section of the Fair Credit Reporting Act and contends that it is not liable unless "malice or willful intent to injure" is shown.

Equifax argues that the Fair Credit Reporting Act had been passed for the benefit of credit reporting agencies and that the limitation of liability section of the Act was a "quid pro quo" for the discovery offered by credit reporting agencies under the

Act. Thus, with this ingenious argument, Equifax has attempted to insulate itself from liability under the Fair Credit Reporting Act by turning the intricate provisions of that Act on end thus frustrating the Congressional intent set forth in such Act. Furthermore, the Court of Appeals has apparently agreed with this Equifax argument by holding that no defamation or like actions are allowed under the Fair Credit Reporting Act unless malice or willful intent is alleged and that secondly, if the information is or has been disclosed to the person being investigated pursuant to the Act, consumer actions are not allowed unless within the qualifications of 1681 h(e), the limitation of liability section.

The factual situation in this case illustrates how the Fair Credit Reporting Act, an act allegedly intended for the benefit of consumers, has instead been construed by the Court of Appeals to the detriment of a consumer. At the time Brenda Thornton acquired the derogatory information from her insurance agent alleging she had been accused of living without benefit of matrimony with a male companion, she was not even aware of the existence of the Fair Credit Reporting Act or the existence of Equifax, a credit reporting agency.

The wording of 1681 h(e) clearly and definitely restricts its application to "*information disclosed pursuant to Section 1681 g, 1681 h, or 1681 m of this Title.*" (Emphasis Supplied) Yet, Equifax has argued that the Fair Credit Reporting Act was meant to protect credit reporting agencies, and the Court of Appeals indeed held that qualified immunity or limitation of liability was intended by Congress to be the "quid pro quo" for full disclosure by a credit reporting agency.

Brenda Thornton agrees that in an instance where a consumer goes to the office of a credit reporting agency and receives information pursuant to a request submitted under the Act to review that consumer's file that the limitation of liability section applies. Brenda Thornton can appreciate the argument of Equifax

that it would have been unfair for Congress to have required it to make all of its files available to all consumers and then be responsible in damages for defamation actions as a result of information obtained through such disclosure when the consumer had not been aware before disclosure of such information. However, in this particular case, even the Court of Appeals agrees that the harmful information was disclosed to Brenda Thornton by her insurance agent telling her that he had received a report to the effect that she had been living for four months with a male companion without benefit of matrimony. Brenda Thornton did not become aware of the defamatory information by virtue of any voluntary disclosure by Equifax—at the time Equifax was contacted, she already knew all about the damaging information. Equifax gave Brenda no other information and the suit was filed based on information already possessed by Brenda. It would be an anomaly of the worst character for Equifax to be able to read Brenda the contents of the report, the defamatory portion of which was already known to her, and then argue that because she had sought disclosure under the FCRA that the limitation of liability section of the FCRA applied to Brenda Thornton. Yet, the opinion of the Court of Appeals sanctions and condones this conduct by Equifax.

Another troublesome roadblock to the guarantee of rights to consumers under the Fair Credit Reporting Act is the exact extent of the qualified immunity. By agreement of all parties at the trial level, this case was presented to the jury on a general verdict. One instruction that deserves mention was the definition of malice meant to be applicable to the pendent state count of common law libel stating as follows:

> Malice is defined as the doing of a wrongful act, either in a personal sense, as the doing of an act intentionally that is wrong, or the doing of an act actuated by spite, grudge, hatred, ill-will or evil intent, or in the impersonal sense, as the doing of an act without just cause or excuse, with such

> a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill-will.

Under the general verdict form in Brenda Thornton's favor, it is presumed that all issues were decided in her favor. Under any reasonable interpretation of the Fair Credit Reporting Act, it is submitted by Brenda Thornton that the above captioned standard of malice should be sufficient to overcome any qualified immunity or limited liability enjoyed by credit reporting agencies. If the Eighth Circuit Court of Appeals is requiring a stronger definition of malice than that set forth in the aforesaid instruction, then the Fair Credit Reporting Act which supposedly was enacted for the benefit of consumers will have in fact set a qualified immunity of such proportions that it will be impossible for a defamed consumer to surmount same and such act will have repealed all state laws granting remedies to consumers against defamation. If this case is allowed to stand, Congress, by attempting to give consumers greater redress against credit reporting agencies, will have in fact accomplished the opposite result.

Petitioner herein believes that the importance of the issue raised deserves consideration by the Supreme Court. Petitioner has not cited cases in this petition because the present Court of Appeals decision is the only case to have considered and interpreted the issue raised herein. If the instant case is not reviewed and corrected, it will stand as a precedent blocking the rights intended to be guaranteed to consumers in all future Fair Credit Reporting Act litigation.

This Petition for Certiorari should be granted to permit the Supreme Court to amalgamate the limitation of liability section of the Fair Credit Reporting Act with the other sections of the Act and preserve the Congressional intent espoused in such Act. If not, rather than advancing the rights of consumers as intended by Congress in the FCRA, such Act can be used by the credit reporting agencies to frustrate previously existing rights of consumers.

CONCLUSION

The important questions of consumer rights under the Fair Credit Reporting Act raised in this Petition of Certiorari have not been decided by a Court of Appeals before. The importance of this federal issue and the protection of consumer rights intended to be guaranteed by the statute which are now emasculated by the statutory interpretation of the Eighth Circuit justifies the issuance of a Writ of Certiorari. Petitioner pleads on her behalf and on behalf of all other consumers for the granting of this Writ.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

No. J-76- C-42

Brenda Thornton,
Plaintiff,

vs.

Equifax, Incorporated, a Georgia corporation,
Defendant.

MEMORANDUM AND ORDER

(Filed March 27, 1979)

This matter arose under the Fair Credit Reporting Act (15 U.S.C. §1680, et seq.), and the Arkansas law of libel. The matter was tried to a jury which granted $5,000.00 in damages and $250,000.00 in punitive damages.

The Defendant has moved for judgment notwithstanding the verdict. In a separate motion Defendant has asked for a new trial, or in the alternative, for a remittitur.

The motions are in order, the groundwork having been laid by appropriate motions, timely made, at the conclusion of the Plaintiff's case, and upon close of all the evidence, (Rule 50, Federal Rules of Civil Procedure).

I will consider the motions in the descending order of their dispositive effect.

The motion for judgment notwithstanding the verdict must be denied unless it can meet the same test applied to motions for directed verdict.

That test is cited at *Polk* v. *Ford Motor Co.*, 529 F.2d 259, 267 (8th Cir. 1976).

> "[I]n passing upon the motion for judgment, the trial court and this court are (1) to consider the evidence in the light most favorable to the plaintiffs as the parties prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiffs; (3) to assume as proved all facts which plaintiffs' evidence tends to prove; (4) to give the plaintiffs the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusions to be drawn from it. *Hanson* v. *Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960)."

Without reviewing the evidence step by step, it is sufficient to say that there was sufficient evidence of lack of investigative controls, reliance on superficial assertions, and publication to allow reasonable men to differ as to the conclusions to be drawn from the evidence.

The motion for judgment notwithstanding the verdict is *denied.*

The motion for a new trial is to be decided upon a different basis.

Rule 50(b) Fed. R. Civ. P. provides for the motion as an alternative to the motion for judgment N.O.V. Rule 59 Fed. R. Civ. P. recites the grounds upon which the motion may be granted. The Rule provides:

> "Rule 59.
>
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . . ."

In broad terms, as restricted by the language of the Seventh Amendment to the Constitution, there can be no re-examination of the facts found by a jury except according to the rules of the Common Law of England. Moores Federal Practice ¶59.05[2], p. 59-42, 59-43: The Seventh Amendment provides:

> ". . . no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The text then summarizes:

> "The Amendment preserves substance but not form. And it will be noted that the Amendment does not provide that there shall be no re-examination of facts tried by the jury: any re-examination not warranted by the common law is improper; a re-examination 'according to the rules of the common law' is proper. The common law alluded to is the common law of England."

In considering this motion for a new trial this Court applies these tests:

1. Has there occurred a clear prejudicial[1] error of law? Moores Federal Practice 6A ¶59.05[2], p. 59-45.

2. Has there occurred a clear prejudicial[1] error of fact? Moores Federal Practice 6A ¶59.05[2], p. 59-45.

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[1] The requirement of a "prejudicial error is mandated by the 'harmless error rule', Rule 61 Fed. R. Civ. P.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

3. Was the verdict, while not entirely outside the evidence, contrary to the great weight of the evidence? Moores Federal Practice 5A ¶50.11, p. 50-99.

The Court has previously ruled as to law and fact questions as they arose. It does not now feel that any of the rulings are so erroneous as to warrant a new trial.

As to the application of the third rule. This is really a statement of the principle discussed in Moores Federal Practice 6A ¶59.05[2], p. 59-40, where the text writer quotes from the annotator's remarks in the case of *Bright* v. *Eynon:*

> ". . . that it would be difficult perhaps to fix an absolutely general rule about granting new trials, without making so many exceptions to it, as might rather tend to darken the matter, than to explain it: but the granting [of] a new trial, or refusing it, must depend upon the Legal Discretion of the Court; guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."

Both the thrust of the Seventh Amendment, and the importance of the jury in our democratic society, require that new trials should not be granted lightly.

So, in this case, this Court cannot find that the determination of liability, and of malicious conduct in support of punitive liability, are not justified by the evidence. Therefore it should not seek a new verdict by retrial.

The motion for a new trial is *denied.*

There remains the motion for a remittitur. The power to grant a remittitur is considered as an adjunct of the power to grant a new trial when the judgment is excessive, i.e., an exercise of the court's authority under the new trial standard, number 3 above. Moores Federal Practice 6A ¶59.05[3], p. 59-47:

"The term "remittitur" is generally used in connection with jury verdicts, and refers to the court's action in diminishing the verdict of the jury. This is usually done on motion of the losing defendant for a new trial on the ground that the verdict is excessive, where, if the trial court considers the ground well taken, it may grant the plaintiff an election to remit a stated portion of the amount or submit to a new trial. Remittitur is also used by the appellate courts in both jury and non jury actions, and, in jury actions, mainly when there has been reversible error committed at the trial, such as erroneous admission of evidence or erroneous instructions, and the maximum effect upon the amount of the verdict due to the error can with reasonable accuracy be determined. The use of remittitur enables the court and the parties to avoid the delay and expense of a new trial, and when wisely used furthers the legitimate objective of bringing litigation to as speedy and expeditious end as is reasonable."

The motion, claiming an excessive verdict, addresses itself to the conscience of the court. But the court's conscience is not the judge's personal opinion of what would be a proper verdict. Rather it is a standard which asks: Is there no basis on which a reasonably responsible jury could have found that verdict within the framework of the correct law and the admissible evidence?

In this Court's opinion these matters are relevant to the question of the reasonableness of the juy's decision.

1. As to the actual damages. Mr. Matheny, the investigator, did admit to telling his wife of his conclusions. This was an improper publication, and standing alone would have justified a verdict for actual damages. When considered along with the Plaintiff's reasonable efforts to search out the source of the slander and the scope of the publication, the damages of $5,000.00 cannot be held unreasonable.

2. As to the exemplary damage figure of $250,000.00. At the outset this Court finds that there was evidence from which a reasonable jury could find a basis for exemplary damages under 15 U.S.C. §1681n(2), or under the common law of malicious libel.

An example of the importance which a jury verdict assumes in an exemplary damage situation is found in *Herman* v. *Hess Oil Virgin Islands Corp.*, 524 F.2d 767 (3rd Cir. 1975).

As the trial developed, Plaintiff exercised her right to show the wealth of the Defendant. The wealth of the Defendant may be considered by a jury in awarding exemplary damages. Restatement (Second) of Torts §908e. *Seifert* v. *Solem*, 387 F.2d 925 (7th Cir. 1967).

In this case the evidence consisted of profit and loss statements of Equifax, Incorporated, which had been extracted from brochures published by Equifax, Incorporated. Plaintiff's argument for the exemplary damages sought was that Equifax, Incorporated, had an annual gross income of $300,000,000.00; that $300,000.00 would represent the profit of the company for about two hours of operation, and that any lesser amount would leave Equifax, Incorporated, feeling it was cheaper to pay damages than to improve its standards. Plaintiff's counsel then asked for $250,000.00 to $300,000.00 in damages.

In its argument, Defendant made a tactical decision to disregard the damage assertions and concentrate on the liability question. Thus, in this situation, the jury found the lowest exemplary damage figure presented to it.

In a recent libel and Fair Credit Reporting Act case, the trial court did reduce a $300,000.00 punitive damage award to $50,000.00. *Collins* v. *Retail Credit Co.*, 410 F. Supp. 924 (E.D. Michigan, N.D. 1976). Treating that decision as precedent can invite error, especially where, as in this case, one can argue that the Plaintiff is not entitled to benefit so extensively in view of

the scope of her damage. But the exemplary damage statute is addressed to restraining the malefactor. Thus the Plaintiff is only an accidental beneficiary of the jury's decision as to the amount necessary to impose an adequate restraint on the malefactor.

The motion for remittitur is *denied.*

IT IS SO ORDERED.

Bismarck, North Dakota, this 21st day of March, 1979.

BY THE COURT:

Bruce M. Van Sickle, Judge
United States District Court
By Assignment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1372

Brenda Thornton,
Appellee,

v.

Equifax, Inc., a
Georgia Corporation,
Appellant.

Appeal from the United States District Court for the District of Arkansas

Submitted: November 8, 1979
Filed: February 27, 1980

Before GIBSON, Chief Judge,* ROSS and STEPHENSON, Circuit Judges.

ROSS, Circuit Judge.

Brenda Thornton sued a credit reporting agency, Equifax, Inc., under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (FCRA), for defamation and failure to comply with the Act's requirements. She also filed a common law count of libel. Appellant Equifax now appeals from the jury verdict awarding Brenda $5,000 compensatory and $250,000 punitive damages. We reverse and remand for a new trial.

* The Honorable Floyd R. Gibson was Chief Judge of the Eighth Circuit at the time this case was submitted and took senior status on December 31, 1979, before the opinion was filed.

At the time of trial, Brenda Thornton was twenty-nine years of age, divorced and the mother of one child. She first became aware of a credit report containing the statement that she had been "for the past four months * * * living without benefit of matrimony with male companion," when her local car insurance agenty called her requesting information on this male companion. Although Brenda's insurance coverage was effective when she filed the application, this was not immediately realized by her. She was upset with the information in the report and requested its source. Referred to appellant, Equifax, as the compiler of the report, Brenda wrote the investigator denying the report and threatening to sue. The letter was forwarded to the regional office of Equifax in Memphis by the investigator, Ben Metheny.

Equifax offered to discuss the report, sent Brenda a brochure outlining the procedures for disclosure under the FCRA, read the information concerning the male companion to appellee, and ordered a reinvestigation. Brenda requested the report be taken from her record and the sources revealed. Metheny, upon reinvestigation, contacted his original two sources, four other sources, and appellee herself. Two of the new sources did not know of anyone in the household other than appellee and her child. Not all of the sources supported Metheny's testimony concerning these conversations at the time of trial.

After reinvestigation, Metheny prepared an alternate report deleting the objectionable information. He testified that he felt the submission of this report was a management decision and sent this report to the regional office. Mr. C. A. Grobe, regional manager, did not send this new report to the insurance company as he decided the first report was accurate. Eventually, Grobe, Brenda, Metheny and appellant's attorney met in Blytheville, Arkansas, in the office of appellee's counsel and Brenda was shown a copy of the report, the names of the sources being

covered. She refused to sign a "consumers statement"[1] which indicated her denial of the information and her request for an apology and monetary compensation because, as she testified, the sources were not disclosed. Grobe did write the insurance company that appellee emphatically denied the information in the report and described the results of all investigating efforts.

This factual situation was submitted to the jury with instructions provided by the trial court. These instructions included a recitation of the provisions of the FCRA as well as separate instructions on punitive and exemplary damages, malice, the state's "conditional privilege" given to mercantile reporting agencies, and the Arkansas statute providing that unmarried

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[1] 15 U.S.C. § 1681i provides in relevant part:

> (b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. * * *
>
> (c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.
>
> (d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within * * * six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

cohabitation constitutes a misdemeanor. A charge of the latter misdemeanor was instructed to constitute libel per se. We find these instructions to be confusing and erroneous and remand the case for a new trial.

The FCRA became effective in 1971. Its provisions provide for the protection of the reputation of the consumer while recognizing the legitimacy of credit reports as a necessary adjunct of commerce for consumer credit, personnel matters, insurance and other needed information. The Act provides for civil liability when a consumer reporting agency fails to comply with any of its requirements (15 U.S.C. §§ 1681n and 1681o). In addition to costs and attorney fees, if such noncompliance is "willful" the damages can be both actual and punitive; if merely "negligent," the damages are restricted to actual damages. Sections 1681n and 1681o create liability only upon the violation of some other section of the Act. In other words, only noncompliance with a requirement so listed in other sections of the Act will trigger these liability sections. *Hansen* v. *Morgan,* 405 F.Supp. 1318, 1319 (D. Idaho 1976), *rev'd on other grounds,* 582 F.2d 1214 (9th Cir. 1978).

Actions or proceedings in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information, however, are specifically provided for in the Act and are limited by the Act in section 1681h(e). If such actions are based on information disclosed pursuant to requirements of the Act, a consumer may *not* bring any such action or proceeding unless the relevant information is false and furnished "with malice or willful intent to injure such consumer."[2] Section

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[2] 15 U.S.C. § 1681h(e) provides:

> (e) Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes

168lh(e) is recognized as providing qualified immunity for consumer reporting agencies with an exception from such qualified immunity being made for actions pursuant to sections 168ln and 168lo (the liability sections providing for failure to comply with provisions or requirements of the Act). Such an exception was not meant to lessen the standard necessary to overcome this qualified immunity in *defamation* actions. "It is clear that the qualified immunity provided for by the FCRA is meant by Congress to be the 'quid pro quo for full disclosure.'" *Retail Credit Co.* v. *Dade County,* 393 F.Supp. 577, 584 (S.D. Fla. 1975).

The limitation of section 168lh(e) is actually twofold. First, no defamation or like actions are allowed under the Act unless malice or willful intent is alleged, *Peller* v. *Retail Credit Co.,* 359 F.Supp. 1235, 1237 (N.D. Ga. 1973), *aff'd,* 505 F.2d 733 (5th Cir. 1974), or proved, *Thomas* v. *Equifax, Inc.,* 142 Ga. 422, 236 S.E.2d 154, 155 (1977). Brenda Thornton did allege malice in this action.

Secondly, if the information is or has been disclosed to the person being investigated *pursuant to the Act,* consumer actions are not allowed *unless* within the qualifications of section 168lh(e). "[T]he Act does not preclude an action at common law *except* where information that would give rise to a cause of action is obtained by the complainant pursuant to the provisions of the Act." *Hood* v. *Dun & Bradstreet, Inc.,* 486 F.2d 25, 32 (5th Cir. 1973), *cert. denied,* 415 U.S. 985, 94 S.Ct. 1580 (1974) (emphasis added).

Under the facts of this case as previously related, Brenda Thornton was notified of the existence of the credit report when the insurance agent called her to obtain driving information on this new potential driver. Upon her request, the agency which compiled the report, Equifax, disclosed to her the contents of

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information to a consumer reporting agency, based on information disclosed pursuant to section 168lg, 168lh, or 168lm of this title, except as to false information furnished with malice or willful intent to injure such consumer.

the report and provided her with information concerning the disclosure requirements under the FCRA. (The issue of whether or not the sources of such information should have been revealed will be discussed later in this opinion.) The fact that Brenda was originally notified of the existence of the information by the insurance company, the procurer of the report, does not make the conditional privilege of the Act inapplicable. Before Equifax has the obligation of disclosure, the consumer must make such a request.[3] In all likelihood, such a request will not be made unless a consumer is aware of the existence of such a report containing unfavorable information. So that the consumer is notified, the Act itself requires notification of the consumer in some circumstances *by the user of the consumer report*. Section 168lm provides in relevant part:

> (a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and addresses of the consumer reporting agency making the report.

The evidence showed that the insurance company in this case inquired as to this potential driver because such additional driver would be material to the risk that they would assume. The agent's call to Brenda in which she first became aware of the existence of the report was thus for the purpose of checking out this information considered to be relevant to this insurance

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[3] The record does not indicate whether the insurance company property disclosed to Brenda its request for an investigative consumer report pursuant to its obligations under 15 U.S.C. § 168ld.

coverage. Upon request, the insurance company quite properly referred Brenda to Equifax so that disclosure under the Act could proceed.[4]

In her amended complaint, Brenda charged that the material in the report was defamatory under the FCRA and that she had a cause of action under this Act for libel. As the information upon which Brenda bases this action was obtained by her pursuant to the provisions of the FCRA, she is required in her defamation action to prove "false information furnished with malice or willful intent to injure" as provided in section 168lh(e). Equifax by its disclosure is entitled to qualified immunity subject to the proof required by the statute. In a defamation action pursuant to proper disclosure under the Act, the Act can be said to preempt the state's common law at least to the extent that a qualified immunity exists and the standard of "malice or willful intent to injure" must be met by complainant to overcome this immunity.[5]

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[4] The court in *Retail Credit Co.* v. *Russell,* 234 Ga. 765, 218 S.E.2d 54 (1975) ruled that in the particular fact situation presented, the Act's conditional privilege did not apply to information disseminated to several of the credit company's subscribers and the Act was inapplicable. This is not similar to the present case, however, because in *Russell* the credit company failed to follow proper disclosure requirements and the noncompliant acts were before the effective date of the Act.

[5] The plaintiff in *Henry* v. *Forbes,* 433 F.Supp. 5 (D. Minn. 1976) alleged violation of provisions of the FCRA as well as state and federal constitutional rights of privacy. The court noted that:

> 1. Defendants' motions must be based on the claims of statutory violations only. The Act provides that unless defendants have procured or used false information "with malice or willful intent to injure" the plaintiff, an action under the statute must stand in lieu of any other action in the nature of invasion of privacy, negligence, or defamation. § 168lh(e). The statutory claims therefore are the only ones properly before this Court.

Id. at 7 n.1.

While Arkansas recognizes a conditional privilege of communication for mercantile reporting agencies, *Dun & Bradstreet, Inc.* v. *Robinson,* 233 Ark. 168, 345 S.W.2d 34, 38 (1961), the standard of proof required to overcome this privilege as provided in the trial court's instructions was not identical to that required in the applicable section of the FCRA. The jury instructions defined malice as both the doing of an act actuated by spite, grudge, hatred, or ill will and the doing of an act without just cause or excuse with conscious indifference or reckless disregard as to its results as to constitute ill will. However, the instruction went on to broaden the standard by adding maliciously, or wantonly or oppressively to the adjectives describing the act proximately causing the damage for which Equifax could be found liable. Oppressive was further defined as "an act or a failure to act * * * if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness * * *." The latter description is considerably wider than the Act's standard of "malice or willful intent to injure." Such general instructions were given for *all* allegations made and thus any distinction made by the Act for qualified immunity in defamation actions and damages for noncompliance complaints could easily have been confused by the jury.

Furthermore, local law applies only to matters of practice and procedure, but substantive rights created by the Act are controlled by federal law and are not subject to 50 different rules of interpretation. *Emerson* v. *J. F. Shea Co.,* 76 Cal. App.3d 579, 143 Cal. Rptr. 170, 176 (1978). The inclusion of the Arkansas statute instruction stating that unmarried cohabitation between a man and a woman was a misdemeanor in Arkansas and libelous per se was irrelevant to this action and could only have served to confuse the jury. We therefore believe that jurors deliberating on defamation actions under the FCRA should

receive clear and concise instructions that fully direct their attention to the Act's qualified immunity section of 168lh(e) and its burden of proof standard requiring "malice or willful intent to injure" only.

While the Act itself does not define these terms, the Supreme Court in *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964) did define the malice necessary to overcome a conditional privilege under the first amendment as "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. The qualified immunity under the Act, however, is not based upon a constitutional privilege as in *New York Times* nor has such protection been extended to credit reporting agencies in states lacking conditional privileges for such agencies. *See Grove* v. *Dun & Bradstreet, Inc.,* 438 F.2d 433 (3d Cir. 1971), *cert. denied,* 404 U.S. 898, 92 S.Ct. 204 (1971) and *Hood* v. *Dun & Bradstreet, Inc.,* 486 F.2d 25, 29 (5th Cir. 1973), *cert. denied,* 415 U.S. 985, 94 S.Ct. 1580 (1974). The qualified privilege under the Act is purely statutory and, as previously stated, is the "quid pro quo" for full disclosure. We cite the *New York Times* standard as an example of a type of malice necessary to overcome a qualified privilege. The instructions should define malice and willful intent to injure in terms which explain what is necessary to overcome the qualified privilege given by the statute.

The same standard of proof as required in section 168lh(e), however, is not required for allegations of noncompliance with the provisions and requirements of the Act (sections 168ln and 168lo). Punitive damages awarded under section 168ln are within the discretion of the court and malice or evil motive need not be found for such award, but the violation must have been willful. Punitive damages are not permitted under section 168lo (negligent failure to comply). The jury instructions in this case did not make such distinctions. Attention should have been drawn to the different standards of proof required for the different allegations of defamation and noncompliance so as not to

void the effect of the qualified immunity section of the Act. The instructions should have further defined what constituted noncompliance together with a proper definition of "willful" as it is used in section 168ln of the Act.

In a strictly noncompliance charge the failure to "follow reasonable procedures to assure maximum possible accuracy of the information" (section 168le) will be subject to the liability of sections 168ln or 168lo; but in a defamation action, any "negligence with respect to the reporting of information" will be subject to the higher requirement of proof of malice or willful intent to injure. No distinction in the charges were made here to guide the jury in reaching a verdict under the applicable law.

We, therefore, remand this case to the trial court for a new trial with instructions to separate any future jury instructions under the FCRA as to the allegations and standard of proof appropriate to a defamation action under the Act from those companies of noncompliance as treated under the civil liability sections of the Act. We also agree with the Wyoming district court's opinion that "[t]he remedies provided by the Act are of a federal statutory nature, and thus defendant's contention that any right to relief in the form of damages is to be determined by state court decisions is illtaken." *Ackerley* v. *Credit Bureau of Sheridan, Inc.*, 385 F.Supp. 658, 661 (D. Wyo. 1974).

As we remand for a new trial, we have no need to pass judgment on appellant's contention that the verdict was excessive. We do find, however, no error in the trial court's determination that appellant could only examine Brenda or the male companion of the report with reference to their sexual relationship during the four-month period mentioned in the initial report. Likewise, we cannot say that the trial court erred in the manner in which it provided appellant the opportunity to make an offer of proof regarding the excluded sexual testimony.

We do find error in the trial court allowing repeated questioning concerning appellant's failure to reveal to Brenda the sources of the information reported. The FCRA provides in section 168lg as follows:

> (a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:
>
> > (1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.
> >
> > (2) The sources of information; *except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed;* Provided, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(Emphasis added.)

As Equifax's report was an "investigative consumer report" within the definition of the Act, appellant had no obligation to reveal such sources to Brenda prior to appropriate discovery procedures. The trial court allowed such questioning on the basis that the question reached into the area of damages. However, if the appellant by provision of the Act was not required to disclose its sources, appellee could not legally have been damaged by appellant refusing to make this disclosure to discovery. That this line of questioning was used by appellee's counsel to prejudice the jury is illustrated in his closing argument to the jury in which upon commenting on the provisions of disclosure he remarked: "In other words, the law doesn't say

they have to do it. It says they need not do it in some instances. In all other instances, they're supposed to do it." Appellant need not defend a practice which under the Act is proper.

Reversed and remanded for a new trial consistent with the views expressed in this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.